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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CALIFORNIANS FOR SAFE AND COMPETITIVE DUMP TRUCK TRANSPORTATION, *et al.*,
Petitioners,
v.
ROBERTA E. MENDONCA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

MARSHA S. BERZON *
SCOTT A. KRONLAND
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

BETTY GRDINA
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 624-6945
Attorneys for International Brotherhood of Teamsters, AFL-CIO

MILES E. LOCKER *
California Division of Labor Standards Enforcement
455 Golden Gate Avenue
9th Floor
San Francisco, CA 94102
(415) 703-4863

DAVID GOSSAGE
IRENE B. MOY
California Department of Transportation
595 Market Street, Suite 1700
San Francisco, CA 94120
(415) 982-3130
Attorneys for State Defendants

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1), preempt California's prevailing wage law insofar as the state law requires that motor carriers, like all other employers, must pay prevailing wages to employees on state public works projects?

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BRIEF IN OPPOSITION

STATEMENT

1. As explained in *California Division of Labor Standards Enforcement v. Dillingham Construction,* 519 U.S. 316 (1997):

> Since 1931, the Davis-Bacon Act, 46 Stat. 1494, as amended, 40 U.S.C. §§ 276a to 276a-5, has required that wages paid on federal public works projects equal wages paid in the project's locale on similar, private construction jobs. California, in 1937, adopted a similar statute, which requires contractors who are awarded public works projects to pay their workers "not less than the general prevailing rate of per diem wages for work of a similar character in the

> locality in which the public work is performed." [*Id.* at 319, quoting Cal. Labor Code § 1771.]

For purposes of California's prevailing wage law, "[w]orkers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed on public work." Cal. Labor Code § 1772. They must be paid by "[t]he contractor to whom the project is awarded, and any subcontractor under him, . . . not less than . . . prevailing rates of wages." Cal. Labor Code § 1774.

Contractors and subcontractors who are "motor carriers" [1] for purposes of certain federal laws may perform work on California public works contracts and, if they do, are, like other types of contractors and subcontractors, subject to the state prevailing wage law. *See, e.g., O.G. Sansone Co. v. Department of Transportation,* 55 Cal. App.3d 434, 127 Cal.Rptr. 799 (1976).

2. Petitioners, "motor carrier" contractors who perform work on California public construction projects (hereafter "carriers"), filed suit in the District Court against state officials and agencies contending that the state prevailing wage law is preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAA Act"), 49 U.S.C. § 14501(c)(1), insofar as that state law applies to "motor carriers" who undertake state public works contracts.[2]

The FAAA Act was adopted, in part, to preempt certain state regulation of intrastate transportation. The Act provides in that regard that:

> a State, political subdivision of a State, or political authority of 2 or more States may not enact or

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[1] "The term 'motor carrier' means a person providing motor vehicle transportation for compensation." 49 U.S.C. § 13102(12).

[2] The International Brotherhood of Teamsters, AFL-CIO, was granted leave to intervene as a defendant. Pet. App. 16a-17a.

> enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property. [49 U.S.C. § 14501(c)(1).]

The carriers alleged that the prevailing wage requirement raises the labor costs of motor carriers when they perform state contracts and therefore leads the carriers to raise their prices on those projects (or to seek to avoid the prevailing wage requirement by using independent contractors instead of employees to operate equipment). Pet.App. 15a. Petitioners asserted that because the prevailing wage law has an economic effect on motor carrier operations, it is a state law "related to a price, route or service of any motor carrier" (49 U.S.C. § 14501 (c)(1)), and consequently is preempted by the FAAA Act.

3. The District Court granted defendants' motion to dismiss. The District Court reasoned that a prevailing wage law is a form of traditional state regulation that should not be held preempted unless "that was the clear and manifest purpose of Congress." Pet.App. 23a (quoting *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). The District Court concluded that Congress' purpose in adopting the FAAA Act was to preempt state regulation of the trucking industry, "such as entry controls, tariffs charged for transportation services, and similar regulation." Pet.App. 26a-27a. "Permitting preemption in this case," the District Court stated, "would overextend the meaning of the 'relate to' language of section 14501" and "lead the court down a dangerous slippery slope" by "expanding the scope of preemption to areas of traditional state control where Congress has not expressed a 'clear and manifest' intent to preempt." Pet.App. 33a.

4. The Court of Appeals affirmed. The unanimous panel, per Judge Sneed, also proceeded from the starting point that the prevailing wage law concerns "matters traditionally within a state's police powers" and therefore should not be held preempted "unless Congress' intent to do so is clear and manifest." Pet.App. 9a. The Court reasoned that the language of the FAAA Act, which preempts state laws "*related to* the price, route or service of any motor carrier" (emphasis supplied) is broad, but that breadth ultimately could not be dispositive because " 'everything is related to everything else.' " Pet.App. 15a (quoting *Dillingham*, 519 U.S. at 335 (Scalia, J., dissenting)).

The Court of Appeals therefore examined Congress' objective in adopting the FAAA Act and found no indication that Congress "intended preemption in this area of traditional state power." Pet.App. 12a. Because the prevailing wage law does not "frustrate the purpose of deregulation by acutely interfering with the forces of competition," and does not "fall[] into the field of laws regulating prices, routes or services," the Court concluded that Congress had not shown a "clear and manifest" intent to preempt it. Pet.App. 15a (emphasis, quotation marks omitted).

Petitioners' suggestion for a rehearing *en banc* was denied, with no judge requesting a vote. Pet.App. 40a.

ARGUMENT

The decision below does not merit review under any of this Court's usual criteria.

First, there is no conflict as to the question presented. Petitioners do not cite, and we are unaware of, any decision holding that the FAAA Act preempts a state prevailing wage law. Petitioners also do not even cite, and we are also unaware of, any decision holding that the FAAA

Act preempts *any* state wage law, even one that applies broadly to employees who are *not* working on public contracts, as to whom the state's interest might arguably be lesser.

The only remotely analogous cases cited in the Petition hold instead that the Airline Deregulation Act (which contains a preemption provision analogous to the provision in the FAAA Act) does *not* preempt, as applied to airlines, generally applicable state anti-discrimination laws, even though such state laws could have some indirect effect on the prices charged by airlines. *See* Petition at 17 n. 16 (citing *Abdu-Brisson v. Delta Air Lines*, 128 F.3d 77 (2d Cir. 1997) and *Aloha Islandair, Inc. v. Tseu*, 128 F.3d 1301 (9th Cir. 1997)). *See also Charas v. TWA*, 160 F.3d 1259 (9th Cir. 1998) (en banc) (Airline Deregulation Act does *not* preempt ordinary state law tort claims for personal injuries against airlines).[3]

Second, the Court of Appeals' decision does not announce new legal principles applicable to a broad class of preemption cases. It merely repeats and applies to a specific context preemption principles that are well-settled.

This Court has "oft-repeated" that "the purpose of Congress is the ultimate touchstone" in any preemption case

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[3] *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992) and *Central Transport, Inc. v. Michigan Public Service Commission*, 566 N.W.2d 299 (Mich. App. 1997), *cert. denied*, 119 S.Ct. 544 (1998), which are cited and relied upon in the Petition, involved state laws directed particularly to regulating the transportation industry, *i.e.* laws within the class of legislation to which the FAAA Act's premption provision was unquestionably targeted. They provide little guidance on the extent to which the FAAA Act preempts generally applicable state laws, or employee protective laws in particular, and are certainly not in conflict with the decision below.

(*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal citations and quotations omitted)), and that

> [a]s is always the case in our preemption jurisprudence, where "federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress.'" [*Dillingham*, 519 U.S. at 325 (emphasis supplied) (quoting *Travelers*, 514 U.S. at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).]

Dillingham, indeed, rejected a claim that part of the *same* California prevailing wage law at issue here is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), leaving no doubt that the prevailing wage law is a form of traditional state regulation entitled, as the Court of Appeals recognized, to a strong presumption against preemption.

Petitioners describe the outcome of the Court of Appeals' application of settled preemption principles to this particular case as the product of "blatant, result-oriented, judicial activism" (Petition at 5), but that seems a poor label for a decision upholding a traditional state labor standards law of 60 years standing.

Third, notwithstanding the considerable hyperbole in the Petition, the Ninth Circuit's holding will not "eviscerat[e] . . . motor carrier deregulation." Petition at 17.

To be sure, the state prevailing wage law *does* prevent public works contractors and subcontractors, including motor carriers, from competing with one another for state contracts to the extent that they cannot cut employee wages below a prescribed level. And this limitation may well increase the prices the state ultimately pays on such

contracts, including for the services of motor carriers. But the state—which in this case is the ultimate customer—is willing to pay those prices.[4]

This Court recognized long ago that "it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon it will permit public work to be done on its behalf, or on behalf of its municipalities" (*Atkin v. Kansas*, 191 U.S. 207, 222-23 (1903)) and that the employees of public works contractors "in a substantial if informal sense, [are] working for the [government]." *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 211 n.7 (1983). Interfering with California's freedom to contract for its *own* public works projects on the terms it chooses does not have anything to do with deregulation. The goal of deregulation is to benefit consumer choice, and in this case the ultimate consumer simply wishes to do business only with contractors who agree not to pay substandard wages to the employees who work on the contract.[5]

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[4] The Petition repeatedly exaggerates the effect of the prevailing wage law on motor carriers. The law does not "requir[e] that employees and equipment be redirected" (Petition at 4) or "compel[] utilization of independent owner-operators rather than employees" (*id.*) or require "extraordinarily invasive service disruption." *Id.* at 6. It simply requires that, like other contractors and subcontractors who choose to work on state public works contracts, contractors and subcontractors who are motor carriers must pay their employees at least prevailing wages for their work on those contracts.

[5] Petitioners make much of the fact that California's prevailing wage law covers motor carriers hauling materials to and from public projects, rather than only transportation confined to the project site. It is hard to see what possible relevance this distinction could have to FAAA Act preemption. The salient point is not where the hauling occurs but that the prevailing wage law covers only contractors and subcontractors working on state public works *contracts*,

Finally, petitioners' argument that the prevailing wage law is preempted by the FAAA Act depends upon reasoning that this Court already has rejected.

a. Petitioners submit that because the prevailing wage law as a practical matter *affects* the prices (and perhaps routes and services) of motor carriers who undertake public works projects, it is *necessarily* a "law . . . *related to* a price, route, or service" (emphasis supplied) of a motor carrier within the meaning of the FAAA Act. But this Court rejected a structurally identical linguistic argument in *Travelers*, holding that a state law with an indirect, purely economic impact on the benefit decisions made by employee benefit plans does not necessarily "relate to" those plans within the meaning of ERISA's preemption provision.

The state law at issue in *Travelers* imposed a 24 percent surcharge on hospital bills for patients with private medical insurance other than Blue Cross and Blue Shield. 514 U.S. at 650. The surcharges were intended to, and did, " 'increase the cost of obtaining medical insurance through any source other than the Blues to a sufficient extent that [benefit plans] will switch their coverage to . . . the Blues.' " 514 U.S. at 652.[6] Although the District Court and Court of Appeals both held this economic impact on the costs incurred by ERISA plans a sufficient connection with ERISA plans to trigger preemption, this Court disagreed.

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so that *wherever* particular work is performed, the state or its agencies or municipalities is the ultimate customer.

[6] The 24 percent surcharge for hospital costs borne by some employee benefit plans as a result of the New York law at issue in *Travelers* is similar in size to the 25 percent increase in operating costs for some motor carriers on public works projects that is alleged here to result from the prevailing wage law.

The nature of the state laws Congress intended to pre-empt in enacting ERISA, this Court held in *Travelers*, cannot be determined based solely on the bare language of the ERISA preemption provision. For, "if 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.' " *Travelers*, 514 U.S. at 655 (citation omitted). *See also De Buono v. NYSA-ILA Medical & Clinical Services Fund*, 117 S.Ct. 1747, 1751 (1997) (" 'Applying the "relate to" provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else.' ") (quoting *Dillingham*, 519 U.S. at 335 (Scalia, J., concurring)).

Accordingly, the *Travelers* Court concluded that "[w]e simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." 514 U.S. at 656 (citation omitted). And in doing so, *Travelers* concluded that given the wide range of state laws likely economically to affect the costs of providing benefits, the indirect economic impact of a state law on the choices made by plan officials is not in itself a sufficient connection with an ERISA plan to trigger preemption. 514 U.S. at 660-62; *see also Dillingham*, 519 U.S. at 334, *quoting Travelers*, 514 U.S. at 668.

Although this Court has not yet construed the preemption provision of the FAAA Act itself, it applied the identically worded preemption provision of the Airline Deregulation Act in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) and *American Airlines v. Wolens*, 513 U.S. 219 (1995). In both Airline Deregulation Act cases, the Court relied heavily upon cases construing the

similarly worded preemption provision in ERISA. *Wolens*, 513 U.S. at 223; *Morales*, 504 U.S. at 384. Because the FAAA Act preemption provision was modeled, in turn, on the Airline Deregulation Act preemption provision (*see* Pet. App. 10a-11a (discussing the FAAA Act's legislative history)), it follows that the same analogy to ERISA preemption should inform the construction of the FAAA Act's preemption provision as well.

b. Once petitioners' simplistic, already rejected contention about the meaning of "related to" is replaced, as it must be, by a focus on the precise impact of the prevailing wage law on motor carrier "prices, routes or services" in light of Congress' objectives in adopting the FAAA Act, petitioners' preemption argument collapses.

Congress' objective in the FAAA Act was to preempt existing state regulation of the intrastate transportation of property. The statute itself explains:

> Congress finds and declares that—(1) the regulation of intrastate transportation of property by the States has (A) imposed an unreasonable burden on interstate commerce; (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and (C) placed an unreasonable cost on the American consumers; and (2) certain aspects of the State regulatory process should be preempted. [FAAA Act § 601(a); 108 Stat. 1569, 1605 (1994).]

The FAAA Act Conference Report describes the nature of the state regulation Congress had in mind: "Typical forms of regulation include entry controls, tariffs filing requirements and price regulation, and types of commodities carried." H.R. Conf. Rep. No. 677, 103d Cong. 2d Sess. 86 (1994) ("Conf. Rep."), reprinted in 1994 U.S.C.C.A.N. 1676, 1759. The Conference Report also refers specifically to various state regulatory programs, such as the California Public Utilities Commission's regula-

tion of the trucking industry at issue in *Federal Express v. California Public Utilities Commission, supra.* Conf. Rep. at 87; 1994 U.S.C.C.A.N. at 1759. The 1994 House hearings that preceded adoption of the FAAA Act also focused on the effects of ~~these state~~ regulatory programs. *Legislation to Preempt State Motor Carrier Regulations Pertaining to Rates, Routes and Services,* Hearing Before the Subcommittee on Surface Transportation of the Committee on Public Works and Transportation, House of Representatives, 103d Cong., 2d Sess. (1994).[7]

At the same time, nothing in the language of the FAAA Act or its legislative history suggests that it was Congress' purpose to preempt generally applicable state labor standards legislation, much less state public works prevailing wage laws.

Preemption of the prevailing wage law would intrude on a state's interest in its own procurement policies without furthering Congress' goal of eliminating state regulations of motor carriers that "impede[] the free flow of trade, traffic, and transportation of interstate commerce" and "place[] an unreasonable cost *on the American consumer* [ ]." FAAA Act, § 601(a)(1)(B), (C); 108 Stat. at 1605 (emphasis supplied). The prevailing wage law applies *only* to contractors who choose to undertake state public works contracts, and then *only* with respect to the wages of the employees actually performing work on those contracts. Contractors on purely private projects are left free to deal on whatever terms they choose.[8]

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[7] The sole case relied upon in the Petition that actually found a state law preempted by the FAAA Act involved just such a regulatory program. *See Central Transport, Inc. v. Michigin Public Service Commission, supra* (concerning the Michigan motor carrier act).

[8] The laws at issue in *Morales* and *Wolens* regulated how airlines marketed their services to the general public. In *Morales,*

Virtually *every* state procurement decision, moreover, can be said to have an effect on the "prices" or "services" of the contractors with which the state deals and the "prices" and "services" of their subcontractors. A generic contract for state deliveries that requires that deliveries be made within a certain number of days, for example, certainly affects the "services" provided to the state. If the FAAA Act preempted state regulations concerning the state's own procurement practices, on the reasoning that such regulation "relates to" motor carrier prices and services, then the state could not enter into any contracts involving motor carrier services at all.

Accepting petitioners' theory of preemption—*viz.* that the FAAA Act preempts state laws that raise motor carrier labor costs—also would result in invalidating a huge amount of general state employment legislation. For "[e]ven basic regulation of employment conditions will invariably affect the cost and price of services." *Travelers*, 514 U.S. at 660.

State laws govern the formation and nature of the employment relationship, the permissible terms of employment, and the manner in which the relationship may be terminated. Whether or not a motor carrier is liable for wrongful termination under state law for a discharge without just cause can certainly affect the carrier's labor costs,

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this Court held that the Airline Deregulation Act preempted state guidelines for the content and format of airline fare advertising. In *Wolens*, this Court held that the Airline Deregulation Act preempted the application of a state consumer fraud law, but not ordinary state contract law, to an airline's changes in its frequent flier program. Both cases differed from this one in that they involved state action that "related to" airline prices in the sense that the state action concerned the subject of airline fares. And both cases also differed from this one in that the state action concerned how the airlines compete for the *public*'s business, which is the competition Congress sought to foster.

for example, and therefore the prices charged. Similarly, much state legislation, including requirements for timely paychecks, pay for jury duty, non-forfeiture of vacation time, minimum wage laws, and disability and other non-discrimination in hiring and firing statutes, impose an economic cost on employers and consequently will affect their prices; a state requirement that janitors receive a lunch break and secretaries receive overtime pay will affect the labor costs of motor carriers along with those of other employers. In short, petitioners' labor cost pass-through argument regarding price impact would create for motor carriers a special exemption from state employment regulation that Congress could not have intended.

Petitioners' interpretation of the FAAA Act "related to" provision also would necessarily apply beyond employment regulation, encompassing within the preemption provision *every* state law with an indirect effect on motor carrier prices. Bridge and road tolls, sales taxes, property taxes, and general tort laws—including the decision whether to recognize comparative or contributory negligence, for example—can have an indirect, albeit substantial, economic impact on the prices charged by motor carriers.

The potentially broad sweep of this impact-based preemption analysis serves to refute that analysis. For, as this Court has emphasized, as the realm of state laws unconnected to the basic purpose of a federal enactment that would be preempted by that enactment grows, the conclusion that Congress intended to preempt them all becomes much less likely. *See Travelers*, 514 U.S. at 601 ("The bigger the package of [state] regulation with indirect effects that would fall on the respondents' reading of [ERISA's preemption provision], the less likely it is that federal regulation of benefit plans was intended to eliminate state regulation . . . .").

An intent to preempt therefore certainly cannot be said to be *clear and manifest*. *See Dillingham*, 519 U.S. at 334 (*quoting Travelers*, 514 U.S. at 668 (where a statute is " 'no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate' . . . [w]e could not hold preempted a state law in an area of traditional state regulation . . . without doing grave violence to our presumption that Congress intended nothing of the sort")).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARSHA S. BERZON *
SCOTT A. KRONLAND
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

BETTY GRDINA
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 624-6945

Attorneys for International Brotherhood of Teamsters, AFL-CIO

MILES E. LOCKER *
California Division of Labor Standards Enforcement
455 Golden Gate Avenue
9th Floor
San Francisco, CA 94102
(415) 703-4863

DAVID GOSSAGE
IRENE B. MOY
California Department of Transportation
595 Market Street, Suite 1700
San Francisco, CA 94120
(415) 982-3130

Attorneys for State Defendants

* Counsel of Record